IN THE

Supreme Court of the United States

NOV 29 1974
MICHAEL RODAK, JR., CLERK

October Term, 1974
No. 74-671

THE STATE OF CALIFORNIA,

Petitioner,

vs.

PAUL HARRIS and FAWN HARRIS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

The petitioner State of California respectfully prays that a writ of certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this habeas corpus action on July 12, 1974, a petition for rehearing having been denied on August 30, 1974.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit, reversing the orders denying habeas corpus relief, is reported at 500 F.2d 1124. A copy of the Ninth Circuit's opinion appears as Appendix A to this petition. A copy of the Ninth Circuit's order denying the petition for rehearing appears as Appendix B to this petition. The unreported opinions of the United States District Court for the Central

District of California, which dismissed the petitions for writ of habeas corpus for failure to exhaust state remedies, appear as Appendix C to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on July 12, 1974. A timely petition for rehearing was filed on July 26, 1974, and denied by the Ninth Circuit on August 30, 1974. This petition for a writ of certiorari is filed within 90 days of that date, and is therefore timely filed. *See United States v. Healy*, 376 U.S. 75, 77-80 (1964), and cases cited. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether a state prisoner seeking federal habeas corpus relief has exhausted state remedies as required by 28 U.S.C. § 2254, subdivisions (b) and (c), where the state's highest court has denied habeas corpus relief without opinion and such denial of relief was presumptively based upon the application of a state procedural rule requiring habeas corpus relief to be sought initially in the lower state courts?

Statutory Provision Involved

28 U.S.C. § 2254, in relevant part:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State

corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the petitioner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Statement of the Case

Petitioner State of California seeks a writ of certiorari to have this Court review the decision of the United States Court of Appeals for the Ninth Circuit reversing orders denying federal habeas corpus relief for failure to exhaust state remedies. As noted in the Ninth Circuit's opinion (Appendix A), these two cases involving respondents Paul and Fawn Harris were heard by the Ninth Circuit *en banc* at the suggestion of the panel that heard the appeals herein, in order to resolve a conflict within several prior decisions of the Ninth Circuit and the district courts, which "are in disarray." (Appendix A, pp. 2-3.)

Respondents Paul and Fawn Harris, husband and wife, were each convicted in Los Angeles County Superior Court at a joint trial of receiving stolen property, in violation of California Penal Code section 496. They were placed on probation and required to serve time in the Los Angeles County Jail as a condition thereof. In an unpublished opinion filed on May 23, 1972, the California Court of Appeal, Second Appellate District, Division Three, affirmed their convictions. No petition for hearing to the California Supreme Court was filed by the Harrises, and that court therefore never had an

opportunity on direct appeal to pass upon the merits of the Harrises' claims. The Harrises next filed petitions for writs of habeas corpus in the California Supreme Court, without first having petitioned for such relief in the superior court and then in the California Court of Appeal, as California procedure generally requires. Their petitions were denied by the California Supreme Court on September 25, 1972, by minute order without opinion or citation of authority.

The Harrises next filed separate and virtually identical petitions for habeas corpus relief in the United District Court for the Central District of California on October 12, 1972. The petitions each named as co-respondents the Superior Court of the State of California for the County of Los Angeles, and Peter Pitchess, Sheriff of Los Angeles County (who had custody of the Harrises), and the People of the State of California as real party in interest.[1] In separate and identical un-

[1]Although, as noted in footnote 2 of the Ninth Circuit's opinion (Appendix A), a stay of execution was in effect at the time the Harrises petitioned for federal habeas corpus relief, the existence of the stay order did not negate the existence of the required "custody" necessary for federal habeas corpus jurisdiction. *Hensley v. Municipal Court*, 411 U.S. 345 (1973). However, the stay order did not in any way affect the application of the exhaustion doctrine to the Harrises. *Hensley v. Municipal Court, supra*, at 353. After the district court had dismissed the Harrises' petitioners, the stay order expired and the Harrises served their county jail time. However, they remain convicted of a felony and are still presently on probation. Should they violate probation, probation can be revoked and they can be sentenced to either county jail or state prison. Furthermore, counsel for petitioner State of California is informed by counsel for the Harrises that the Harrises will continue to seek habeas corpus relief when these cases are returned to the district court. Under these circumstances, the cases presented here are clearly not moot. *Sibron v. New York*, 392 U.S. 40, 57-58 (1968).

reported opinions filed on October 17, 1972, without requesting a response to the petitions,[2] the district court dismissed the petitions for failure to exhaust state remedies.

On appeal to the United States Court of Appeals for the Ninth Circuit, the two cases were consolidated on motion of the State of California, which appeared and briefed and argued the instant cases as the real party in interest. Overruling four prior Ninth Circuit decisions and an equal number of contrary district court decisions, the Ninth Circuit reversed the orders denying relief and remanded the cases for further proceedings consistent with the Ninth Circuit's opinion. A timely petition for rehearing by the State of California was denied by the Ninth Circuit on August 30, 1974.

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[2]As noted in the Ninth Circuit's opinion (Appendix A, pp. 4-5), petitioner State of California does not rely upon the rationale of the district court's opinions, but does contend that the district court correctly concluded that the Harrises had not properly exhausted state remedies.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

These Cases Present an Important and Recurring Federal Question Concerning the Exhaustion of State Remedies as a Prerequisite to Federal Habeas Corpus Relief

Without first seeking habeas corpus relief in the lower California courts, respondents Paul and Fawn Harris petitioned for state habeas corpus relief in the California Supreme Court. It is well settled in California that although the California Supreme Court, the California Courts of Appeal and the superior courts all have original jurisdiction on habeas corpus,[3] the appellate courts may deny relief on the ground that the petitioner has failed to apply initially for the writ in the superior court. *In re Hillery*, 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759 (1962); *In re Elias*, 209 Cal. App. 2d 262, 264, 25 Cal. Rptr. 739 (1962); 24 Cal. Jur. 2d, *Habeas Corpus*, § 68, p. 524; B. Witkin, *California Criminal Procedure*, § 795, p. 767.[4] The reason for the rule is that the superior courts are the trial courts in California and as such are equipped to conduct evidentiary hearings to de-

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[3]Article VI, section 10 of the California Constitution provides, in relevant part:

> "The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings."

[4]California's practice in this regard is the same as that followed by this Court, which, absent exceptional circumstances, will not entertain an original habeas corpus petition filed by a federal prisoner where the lower federal courts have not ruled on the petition. *Ex parte Hawk*, 321 U.S. 114, 117 (1944); *Ex parte Hawk*, 318 U.S. 746 (1943); *Ex parte Spaulding*, 317 U.S. 593 (1942); *Ex parte Current*, 314 U.S. 578 (1941).

termine disputed issues of fact,[5] whereas the California Courts of Appeal and California Supreme Court function primarily as reviewing courts are not equipped to conduct the evidentiary hearings necessary in many cases. *In re Hillery, supra; In re Elias, supra.* As the California Supreme Court recently stated:

> "In California the appellate courts as well as the superior courts exercise original habeas corpus jurisdiction. As stated above, however, appellate courts are not equipped to have prisoners brought before them and to conduct testimonial hearings on disputed issues of fact." *In re Hochberg,* 2 Cal. 3d 870, 873-74 n. 2, 87 Cal. Rptr. 681, 471 P. 2d 1 (1970).

The California Supreme Court denied without opinion or citation of authority the habeas corpus petitions filed by the Harrises. California urged in the Ninth Circuit, and again urges here, that the Harrises have not properly exhausted existing state remedies because the Harrises have not shown that the denial of state relief by the California Supreme Court was not based upon the application of the aforementioned valid state procedural rule which leaves the Harrises free to reapply for the writ in the superior court.[6]

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[5]The Harrises asserted several factual issues, not presented to the California Court of Appeal on their direct appeals following their conviction, concerning the alleged incompetency of their jointly retained trial counsel as the basis for habeas corpus relief.

[6]The Ninth Circuit's opinion suggests that the rule set forth in *In re Hillery, supra,* 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759 (1962), which authorizes denial of habeas corpus relief by a California appellate court where relief is not initially sought in the superior court, has been discarded by the California Supreme Court. (Appendix A, pp. 8-9.) In apparent response, the California Supreme Court on July 25, 1974, only 13 days after the Ninth Circuit's opinion was filed, issued an order denying a

(This footnote is continued on next page)

The importance of this exhaustion issue to the State of California is apparent from the fact that in the one year period from October of 1973 to October of 1974 (the most recent period for which complete figures are available to petitioner), the California Supreme Court took substantive action on 865 petitions for writ of habeas corpus,[7] and in almost exactly half of all these cases (431 or 49.8%) the action taken was to deny the petition without opinion or citation of authority.[8] The decision by the Ninth Circuit therefore resolves the issue of exhaustion of state remedies in half of all habeas corpus petitions decided by California's highest court. In just the one year period

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petition for hearing "without prejudice to the filing of a petition for writ of habeas corpus in the superior court." *People v. Wolford* (California Supreme Court Minutes for July 25, 1974, Number 23 California Official Reports). It is therefore clear that the California Supreme Court continues to apply the rule that habeas corpus relief should initially be sought in the superior court rather than in the California Supreme Court. The contrary suggestion in the Ninth Circuit's opinion is an erroneous construction of California habeas corpus practice.

[7]These figures are obtained from a survey of the official minutes of the California Supreme Court, which are published in the back of the advance sheets of the California Supreme Court reports.

[8]The Ninth Circuit's opinion states that since 1969 the California Supreme Court has "changed its practice" concerning summary denials of habeas corpus petitions, and now "frequently" cites some authority to indicate the grounds for its denial of relief. (Appendix A, p. 7.) But the issue here is not whether the exhaustion requirement has been satisfied in those cases where the California Supreme Court denies relief with citation of authority, but rather whether the exhaustion requirement has been satisfied where there is no citation of authority to indicate whether the California Supreme Court's denial was on procedural grounds or on the merits. The Ninth Circuit's statements, therefore, should not obscure the fact that in virtually half (49.8%) of all petitions denied by the California Supreme Court there is no citation of authority to indicate whether the denial was on procedural grounds or on the merits. That is the situation presented by the denial of the Harrises' petitions. The Ninth Circuit's statement begs the question presented by the instant cases.

from October of 1973 to October of 1974, the Ninth Circuit decision in this case resolves the exhaustion issue incorrectly and adversely to the State of California in 431 cases, each of which is a potential federal habeas corpus petition.

The necessary effect of the Ninth Circuit's decision herein is to sanction the frequent efforts of state prisoners to circumvent or ignore state habeas corpus procedural requirements. It permits a California prisoner to bypass the lower California courts and file a *pro forma*, procedurally defective, habeas corpus application in the California Supreme Court, knowing from the past practice of that court that there is a 50-50 chance that the court will issue a summary denial of his petition without opinion or citation of authority. If the California Supreme Court adheres to its practice of denying petitions without opinion or citation of authority,[9] a practice motivated by the need to conserve valuable judicial resources, it will automatically be deprived of the "fair opportunity" it deserves to rule on the merits of the petition before federal relief is sought. *Picard v. Connor*, 404 U.S. 270, 275 (1971); *see also Preiser v. Rodriguez*, 411 U.S. 475, 490-91 (1973).

The Ninth Circuit cannot directly compel the California Supreme Court to abandon its practice of denying petitions without opinion or citation of authority, since there is nothing unconstitutional about the practice, but the Ninth Circuit's opinion exerts an improper coercive force on the California Supreme Court to do

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[9]Since the Ninth Circuit handed down its decision herein, the California Supreme Court has adhered to its practice of denying about half of all habeas corpus petitions without opinion or citation of authority.

so in order to preserve its right to rule on the merits of habeas corpus petitions before federal relief is sought.

This court generally issues no opinion or citation of authority in the hundreds of cases annually in which it denies petitions for certiorari.[10] Practical considerations of economy of limited judicial resources similarly operate to constrain the California Supreme Court to deny approximately half of all habeas corpus petitions without opinion or citation of authority. These denials of relief should not be construed as a decision on the merits and a waiver of procedural defects any more than a denial of certiorari by this Court is so construed. As Mr. Justice Frankfurter aptly observed in defending this Court's practice of denying certiorari without opinion:

> ". . . For if denial [of certiorari] does import an expression of opinion upon the merits of the case, then we must deal with the merits of the case." *Darr v. Burford*, 339 U.S. 200, 228 (1950) (Frankfurter, J., dissenting).

So here, if the denial of habeas corpus relief without opinion or citation of authority is to be construed as an expression of opinion by the California Supreme Court on the merits of the petition, and a waiver of any patent procedural defects, then the California Supreme Court will be compelled either to deal with the merits of each of the approximately 865 petitions for habeas corpus which come before it each year, or else

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[10]Just as this Court's certiorari jurisdiction is discretionary, the writ of habeas corpus in California is a prerogative writ (*In re Estrada*, 63 Cal. 2d 740, 750, 48 Cal. Rptr. 172, 408 P. 2d 948 (1965)), and issuance of the writ "is always addressed to the sound discretion of the court" (*In re Fortenbury*, 38 Cal. App. 2d 284, 289, 101 P. 2d 105 (1940)).

relinquish its right to first pass upon the merits of the petition in advance of the federal courts.

In addition to depriving the state courts of a "fair opportunity" (*Picard v. Connor, supra*) to rule on the merits of state prisoners' claims, the Ninth Circuit's decision will greatly increase the work load of the federal courts on habeas corpus. The state courts serve to screen unmeritorious petitions and substantially reduce the crushing burden which would otherwise fall upon the federal courts. In the past this Court has encouraged states to adopt habeas corpus procedures "and thus relieve the federal courts of this ever-increasing burden" of testing federal claims raised by state prisoners. *Case v. Nebraska*, 381 U.S. 336, 340 (1965) (Clark, J., concurring). The effect of *assuming* exhaustion of state remedies in every case where the California Supreme Court denied habeas corpus relief without opinion or citation of authority, as the Ninth Circuit opinion herein does, is to place on the federal courts the burden of disposing of potentially hundreds of extra habeas corpus petitions filed by California prisoners annually. The effect of the easy bypass of the state courts made possible by the Ninth Circuit's opinion herein is to shift the initial screening process from the state courts, where it rightfully belongs, to the federal courts, where it does not belong.

In addition to the effect on California, it is well known that a great many states use the procedure of summary denial of defective habeas corpus petitions without opinion or citation of authority. In particular, Nebraska's use of the practice and the application of the exhaustion requirement thereto was considered by this Court in *Ex parte Hawk*, 321 U.S. 114 (1944),

discussed *infra*, and more recently by the Eighth Circuit in *Goham v. Wolff*, 471 F.2d 52 (8th Cir. 1972). Illinois makes use of the practice. *United States v. Ragen*, 143 F.2d 774, 776-77 (7th Cir. 1944); *People v. Nierstheimer*, 148 F.2d 8, 9 (7th Cir. 1945). The frequent use of the practice by New York is noted in *Schechtman v. Foster*, 172 F.2d 339, 342 (2d Cir. 1949), *cert. denied*, 339 U.S. 924 (1950). Many other states presumably do likewise. The effect of the Ninth Circuit's ruling herein is thus of great importance not only to California, where the issue affects approximately half of all habeas corpus petitions decided by the California Supreme Court, but to a large number of other states in the nation.

II

The Ninth Circuit's Decision Is in Direct Conflict With This Court's Decisions in Ex Parte Hawk and Darr v. Burford

The Ninth Circuit's decision herein is in direct conflict with this Court's decision in *Ex parte Hawk, supra*, 321 U.S. 114 (1944), which is not cited or distinguished in the Ninth Circuit's opinion. Petitioner in *Ex parte Hawk* had sought habeas corpus which was denied without a hearing by the Nebraska District Court, and that decision was affirmed by the Nebraska Supreme Court. This Court denied certiorari. Petitioner in *Hawk* then filed for habeas corpus in the United States District Court for Nebraska, alleging matters not previously brought to the attention of the state courts. This application was denied without a hearing and the Circuit Court of Appeals for the Eighth Circuit affirmed on the ground that state remedies had not been exhausted. Petitioner then urged his latest con-

tentions upon the Nebraska Supreme Court in a petition for writ of habeas corpus, which was denied without opinion. This Court denied his petition for habeas corpus on the same allegations, without prejudice to presentation of the matters to the United States District Court. Petitioner accordingly renewed his petition for habeas corpus to the United States District Court for Nebraska and filed a like petition with the senior Circuit Judge for the Eighth Circuit. Both petitions were denied and leave to appeal to the Eighth Circuit was denied. Petitioner thereupon filed his application for leave to file his petition for writ of habeas corpus in this Court.

This Court denied leave to file the petition on the ground that petitioner still had not exhausted his available state remedies. This Court concluded:

> ". . . petitioner has not yet shown that he has exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief in a federal court or by a federal judge.
>
> "So far as appears, petitioner's present contentions have been presented to the state courts only in an application for habeas corpus filed in the Nebraska Supreme Court, which it denied without opinion. *From other opinions of that court it appears that it does not usually entertain original petitions for habeas corpus, but remits the petitioners to an application to the appropriate district court of the state,* from whose decision an appeal lies to the state Supreme Court [citations]. From that court the cause may be brought here for review if an appropriate federal question is properly presented.
>
> "*Of this remedy in the state court petitioner has not availed himself. . . .*" *Ex parte Hawk, supra,* 321 U.S. at 116 (emphasis added).

California's habeas corpus procedure is identical in all essential respects to the Nebraska procedure described in *Ex parte Hawk*, the only difference being that there is no appeal from the denial of habeas corpus relief by a lower California court to the California Supreme Court; the habeas corpus petitioner is required to file a new petition in the California Supreme Court. *In re Crow*, 4 Cal. 3d 613, 621 n.8, 94 Cal. Rptr. 254, 483 P. 2d 1206 (1971). The critical fact is that California appellate courts, like Nebraska's, do not usually entertain original petitions for habeas corpus but remit the petitioner to an application to the appropriate superior court of the state, which is equipped to conduct evidentiary hearings on disputed issues of fact. *In re Hochberg, supra*, 2 Cal. 3d 870, 873-74 n. 2, 87 Cal. Rptr. 681, 471 P. 2d 1 (1970); *In re Hillery, supra*, 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759 (1962); *In re Elias, supra*, 209 Cal. App. 2d 262, 264, 25 Cal. Rptr. 739 (1962); 24 Cal. Jur. 2d, *Habeas Corpus*, § 68, p. 524; B. Witkin, *California Criminal Procedure*, § 795, p. 767.

The Ninth Circuit's decision nowhere mentions this court's decision in *Ex parte Hawk*, which is controlling in the instant cases. A denial of *certiorari* herein would undoubtedly be construed by the bench and bar of the various states and federal courts as tacit acquiescence in what can only be construed as the Ninth Circuit's *sub silentio* overruling of this Court's 1944 decision in *Ex parte Hawk*. California asks this Court to grant certiorari to reaffirm the correctness and continued vitality of *Ex parte Hawk*, which is in direct conflict with the Ninth Circuit's decision herein.

The Ninth Circuit's decision also cannot be squared with this Court's decision in *Darr v. Burford, supra*,

339 U.S. 200, 218-19 (1950) (*overruled on another ground* in *Fay v. Noia*, 372 U.S. 391 (1963)), where this Court stated:

> ". . . The petitioner has the burden also of showing that other available remedies have been exhausted or that circumstances of peculiar urgency exist."

By *assuming* an exhaustion of remedies that the Harrises cannot in fact establish, the Ninth Circuit has shifted the burden of proof on the exhaustion issue onto California, contrary to this Court's pronouncement in *Darr v. Burford, supra.* An obvious procedural defect in the petitions filed by the Harrises, *i.e.*, their failure to first seek relief in the superior court so that disputed factual issues could be resolved in the proper forum, implies that the California Supreme Court denied relief without opinion or citation of authority by virtue of this procedural defect and without reaching or passing upon the merits of the petition. In view of the apparent procedural ground for the denial, the Harrises have the burden of establishing that the California Supreme Court's denial of relief was on the merits. Exhaustion cannot properly be *assumed*, as the Ninth Circuit's opinion does.

It is the Harrises who have circumvented established state procedure by failing to seek relief first in the superior court, and it is therefore only fair that any doubts on the exhaustion issue be resolved against them. As the Ninth Circuit itself has said previously:

> ". . . The mandate of the Supreme Court of the United States is that the *petitioner*, by actual *attempt*—and not the Federal court, by prognostication or ratiocination—shall exhaust all state remedies before applying to a Federal tribunal for relief.

> "It is not enough for the petitioner to show that possibly, arguably, or even probably, the state courts offer him no legal avenue of release from his confinement. . . ." *Barton v. Smith*, 162 F.2d 330, 333 (9th Cir. 1947) (emphasis in original).

It cannot be assumed, as the Ninth Circuit opinion does, that the Harrises have no available remedy in the California courts when they have failed to attempt the proper remedy, which is still available to them—a habeas corpus petition filed in the superior court, and if unsuccessful there followed by new petitions in the Court of Appeal and only then in the California Supreme Court. Use of the correct procedure will allow the superior court to resolve the disputed factual issues alleged in the petitions and will put the California appellate courts in the proper position to evaluate the Harrises' contentions on their merits.

III

The Ninth Circuit's Opinion Conflicts With Decisions of the Seventh and Eighth Circuits, as Well as With Prior Opinions of the Ninth Circuit Itself

California also seeks certiorari to resolve a conflict between the circuits on the recurring question presented herein. Following this Court's decision in *Ex parte Hawk, supra*, the Seventh Circuit, in *United States v. Ragen, supra*, 143 F.2d 774, 776-77 (7th Cir. 1944) and *People v. Nierstheimer, supra*, 148 F.2d 8, 9 (7th Cir. 1945), and the Eighth Circuit more recently in *Goham v. Wolff, supra*, 471 F.2d 52, 54-55 (8th Cir. 1972), have each ruled that state remedies are not

exhausted where state habeas corpus relief is summarily denied without opinion, under circumstances indistinguishable from the instant cases. The Ninth Circuit's decision herein conflicts with these decisions from the Seventh and Eighth Circuits, which are not cited in the Ninth Circuit's opinion.

The difficulty and recurring nature of the problem presented herein is perhaps best shown by the course of decisions within the Ninth Circuit itself. In its opinion the Ninth Circuit noted that the question of whether summary denials of relief without citation of authority are sufficient to constitute exhaustion of state remedies has generated conflicting Ninth Circuit and District Court opinions:

> "On that question the decisions of this court are in disarray. In the following cases, we have held that the petitioner had exhausted his remedies:
>
> "Wade v. State of California, 9 Cir. 1971, 450 F.2d 726, 728
>
> "Barquera v. People of the State of California, 9 Cir., 1967, 374 F.2d 177, 180
>
> "Castro v. Klinger, 9 Cir., 1967, 373 F.2d 847, 850
>
> "On the other hand, in other cases we have held that the petitioner had not exhausted his remedies on the ground that the California Supreme Court may have based its denial on procedural grounds:
>
> "Moreno v. Nelson, 9 Cir., 1973, 472 F.2d 570
>
> "Baskerville v. Nelson, 9 Cir., 1972, 455 F.2d 430

"Turner v. Lloyd, 9 Cir., 1971, 439 F.2d 138

"Conway v. Wilson, 9 Cir., 1966, 368 F.2d 485

"Not surprisingly, decisions of the district courts are also in disarray. In Hamilton v. Craven, N.D. Cal., 1971, 350 F.Supp. 1251, 1254, aff'd., 9 Cir., 1972, 469 F.2d 1394, the court held that the petitioner had exhausted his remedies, and our affirmance was 'for the reasons stated in the opinion of the district judge.' (469 F.2d at 1394) In contrast, several district court opinions hold or say that the petitioner has not exhausted his remedies:

"Rawlins v. Craven, C.D. Cal., 1971, 329 F. Supp. 40 (dictum)

"Gingrich v. Oberhauser, C.D. Cal. 1969, 305 F.Supp. 738, 741 (dictum)

"Rogers v. Nelson, N.D. Cal., 1969, 300 F. Supp. 421, 422

"Gardella v. Field, C.D. Cal., 1968, 291 F. Supp. 107, 114-7

"At the suggestion of the panel that heard the appeals at bar, we have taken these cases en banc to settle the question." (Appendix A, pp. 2-3.)

In "settling the question" in the Ninth Circuit created by the "disarray" of prior Ninth Circuit and district court opinions within that circuit, the Ninth Circuit has created an even more serious conflict between the circuits and with the prior decision of this Court in *Ex parte Hawk, supra,* 321 U.S. 114 (1944). Certiorari is needed to resolve these conflicts.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Paul Harris, Petitioner-Appellant, vs. Superior Court of the State of California for the County of Los Angeles, Peter Pitchess, Sheriff of Los Angeles County, Co-Respondents, The State of California, Real Party in Interest, Appellees. No. 72-2849.

Fawn Harris, Petitioner-Appellant, vs. Superior Court of the State of California for the County of Los Angeles, Peter Pitchess, Sheriff of Los Angeles County, Co-Respondents, The People of the State of California, Real Party in Interest, Appellees. No. 72-2852.

[July 12, 1974].

On Appeal from the United States District Court for the Central District of California.

Before: CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE and SNEED, Circuit Judges:

DUNIWAY, Circuit Judge:

It is the practice of the Supreme Court of California, when it denies a petition for a writ of habeas corpus, to enter a very brief order, usually, as in these cases, merely stating "Petition for Writ of Habeas Corpus denied." A postal card notice, reciting the denial, is then sent to the petitioner. Such orders are generally referred to as "postcard denials."[1] In many cases a

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[1]See *The Minutes of the California Supreme Court* in The Official Advance Sheets of the California Supreme Court; A Study of Postconviction Procedures in California, *Cal. Judicial Council 1971 Annual Report*, 22, 31 (1971).

California prisoner, after exhausting his remedies by direct appeal, seeks post conviction relief by filing a petition for a writ of habeas corpus with the Supreme Court of California. If he receives such a postcard denial, he turns to a Federal district court, seeking habeas corpus under 28 U.S.C. §2254. The California Attorney General then argues that the petitioner has not ". . . exhausted the remedies available in the courts of the State [of California] . . ." as is required by §2254(b).

On that question the decisions of this court are in disarray. In the following cases, we have held that the petitioner had exhausted his remedies:

Wade v. State of California, 9 Cir., 1971, 450 F.2d 726, 728

Barquera v. People of the State of California, 9 Cir., 1967, 374 F.2d 177, 180

Castro v. Klinger, 9 Cir., 1967, 373 F.2d 847, 850

On the other hand, in other cases we have held that the petitioner had not exhausted his remedies on the ground that the California Supreme Court may have based its denial on procedural grounds:

Moreno v. Nelson, 9 Cir., 1973, 472 F.2d 570

Baskerville v. Nelson, 9 Cir., 1972, 455 F.2d 430

Turner v. Lloyd, 9 Cir., 1971, 439 F.2d 138

Conway v. Wilson, 9 Cir., 1966, 368 F.2d 485

Not surprisingly, decisions of the district courts are also in disarray. In *Hamilton v. Craven*, N.D.Cal., 1971, 350 F.Supp. 1251, 1254, aff'd., 9 Cir., 1972, 469 F.2d 1394, the court held that the petitioner had

exhausted his remedies, and our affirmance was "for the reasons stated in the opinion of the district judge." (469 F.2d at 1394) In contrast, several district court opinions hold or say that the petitioner has not exhausted his remedies:

Rawlins v. Craven, C.D.Cal., 1971, 329 F. Supp. 40 (dictum)

Gingrich v. Oberhauser, C.D.Cal., 1969, 305 F.Supp. 738. 741 (dictum)

Rogers v. Nelson, N.D.Cal., 1969, 300 F.Supp. 421, 422

Gardella v. Field, C.D.Cal., 1968, 291 F.Supp. 107, 114-7

At the suggestion of the panel that heard the appeals at bar, we have taken these cases in banc to settle the question.

The petitions in these cases are virtually identical. Petitioners Paul and Fawn Harris, husband and wife, were convicted on March 19, 1971, in a California Superior Court, of receiving stolen property. Their convictions were affirmed by the California Court of Appeal on May 23, 1972, but no petition for a hearing before the California Supreme Court was filed because, they allege, they were not notified of the appellate court's action by their attorney until the time for petitioning the California Supreme Court had expired. Petitioners next filed petitions for writs of habeas corpus in the California Supreme Court. They received a post card denial, quoted above. They then petitioned the district court for writs of habeas corpus and that court dismissed the petitions on the ground that pe-

titioners had not exhausted state remedies.[2] They then appealed to this court.

The district court cited our decision in *Williams v. Nelson*, 9 Cir., 1970, 431 F.2d 932, concluding that "there has not been an exhaustion of state remedies in that the petitioner[s] . . . failed to request permission for filing a late appeal pursuant to California Court Rules 31a." In his brief, the California Attorney General does not rely upon the rationale of the district court's opinion. The provision in California's Rule 31(a) on which the district judge relied, and on which this court relied in *Williams v. Nelson, supra*, was deleted from the California Rules of Court, effective January 1, 1972. 23 West's Ann. Cal. Codes, Court Rules; 1974 pocket part, p. 31. Moreover, our decision in *Williams v. Nelson, supra*, insofar as it relates to California Rule 31(a) as it then read, was wrong. The rule did not apply to a petition for a hearing by the Supreme Court after a decision by the Court of Appeal. *In Re Wallace*, 1970, 3 Cal.3d 289, 293; 90 Cal. Rptr. 176, 475 P.2d 208.

The California Attorney General argues that the petitioners failed to exhaust their state remedies because the California Supreme Court may have denied their habeas corpus petitions on procedural rather than on substantive grounds. He relies upon the fact that

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[2]Each petitioner was granted probation for five years, conditioned upon payment of a fine and as to Paul upon spending fourteen days and as to Fawn seven days in the Los Angeles County jail. When their federal petitions for habeas corpus were filed on October 12, 1972, a stay of execution until October 24, 1972 had been granted by the state court. Nevertheless, the petitioners were sufficiently "in custody" (28 U.S.C. §2254(a)) to give the Federal court jurisdiction. *See Hensley v. Municipal Court*, 1973, 411 U.S. 345, reversing our decision, reported at 453 F.2d 1252.

California appellate courts may refuse to entertain habeas corpus petitions where no previous application for such relief has been made in the Superior Court. See *In Re Hillery*, 1962, 202 Cal.App.2d 293, 294, 20 Cal. Rptr. 759. Thus, if the California Supreme Court denied the Harris' petitions because they did not first seek relief in a lower court, the denial would be procedural. As we have seen, some of our decisions have accepted this reasoning, while others have rejected it.

If a state court denies a petition for post conviction relief on procedural grounds, the petitioner has not exhausted his state remedies. He can still use the proper procedure, thus giving the state court the first opportunity to rule on the merits of his federal claims. This is what 28 U.S.C. §2254(b) requires. *Wilwording v. Swenson*, 1971, 404 U.S. 249, 250.

This doctrine, however, has its limits. As the Supreme Court has often said, the doctrine which requires the exhaustion of state court remedies before the federal court will entertain habeas corpus petitions is based upon comity and is not a limitation on the power or jurisdiction of the federal courts.[3]

> "Section 2254 does not erect insuperable or successive barriers to the invocation of federal habeas corpus. The exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights. *Fay v. Noia*, 372 U.S. 391, 438 (1963). Petitioners are not required to file

[3]*Picard v. Connor*, 1971, 404 U.S. 270, 275; *Fay v. Noia*, 1963, 372 U.S. 391, 419, 438; *Ex Parte Royall*, 1886, 117 U.S. 241, 250-1; R. Sokol, *Federal Habeas Corpus*, 162 (2d ed. 1969).

> 'repetitious applications' in the state courts. *Brown v. Allen,* 344 U.S. 443, 449 n.3 (1953). Nor does the mere possibility of success in additional proceedings bar federal relief. *Roberts v. LaVallee,* 389 U.S. 40, 42-3 (1967)." *Wilwording v. Swenson, supra,* 404 U.S. at 250.

"[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied," *Picard v. Connor, supra,* 404 U.S. at 275. No interest of comity is served by burdening the state and federal courts with repetitious applications for habeas corpus "in the guise of requiring petitioners to exhaust state remedies." *Ross v. Craven,* 9 Cir., 1973, 478 F.2d 240, 241; *Wilwording v. Swenson, supra.*

In the case of California petitioners, we have had difficulty in determining whether the California Supreme Court's denial of a petition for habeas corpus was on procedural grounds or was on the merits. The use by that Court of the postcard denial has been at the root of the problem. As we have noted before, "[f]rom our standpoint, the failure of the California court to reveal the basis of its denial, whether substantive or procedural, is unfortunate." *Castro v. Klinger, supra,* at 850.

Much of the problem stems from the fact that the California Supreme Court, along with the courts of appeal and the superior court, has original jurisdiction over habeas corpus petitions, Cal. Const. Art. VI §10; *In Re Hochberg,* 1970, 2 C. 3d 870; 87 Cal. Rptr. 681, 471 P.2d 1, 3. As a result, many California prisoners seeking post conviction relief file their

petitions for writs of habeas corpus in the Supreme Court in the first instance.

The California Attorney General asserts that the California Supreme Court is likely to deny such a habeas corpus petition on the ground that the petitioner has failed to apply for the writ in the Superior Court or the Court of Appeal. There is no doubt that the California Supreme and appellate courts have the power to dismiss habeas corpus petitions on these grounds. *In Re Hillery, supra; In Re Elias,* 1962, 209 Cal.App.2d 262; 25 Cal. Rptr. 739; B. Witkin, *California Criminal Procedure* §795 at 767-8 (1963). Moreover, there is little doubt that in the past the practice of the California appellate courts was to decline to entertain habeas corpus petitions when the petitioners had not filed in the lower courts in the first instance. *In Re Trainor,* 1935, 5 Cal. App. 2d 593, 594; 43 P. 2d 579; *In Re Brune,* 1931, 113 Cal.App. 254; 298 P. 80; 24 Cal. Jur. 2d Habeas Corpus §68 at 522-26, § 76 at 541-2.

However, the California Supreme Court has changed its practice in this regard. In 1969, the Court slightly revised the form of its postcard denials. In denying habeas corpus petitions without opinion the Court now frequently cites either a California Supreme Court case or some other authority which indicates to the petitioner the grounds for the denial. For example, if the petitioner did not "allege with particularity the facts upon which he would have a final judgment overturned," the California Supreme Court will cite *In Re*

Swain, 1949, 34 C.2d 300; 209 P. 2d 793, in its post-card order. These citations may indicate to the petitioner that his petition has been denied on procedural grounds (such as a citation to *Swain*), or on substantive grounds, *see Ross v. Craven, supra.* Since it has begun this method of citation of cases, the California Supreme Court has never cited *In Re Hillery, supra,* the case upon which the Attorney General relies.[4] In fact, the California Supreme Court has *never* cited *In Re Hillery* nor has it cited any other case in at least ten years which would indicate that the filing of a habeas corpus petition in the lower court is a prerequisite to consideration of a habeas corpus petition in the Supreme Court.

On the contrary, the California Supreme Court has accepted numerous habeas corpus petitions in the last few years despite the failure of the petitioners to file below.[5] Moreover, the Court has stated that it does

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[4]In *Erenyi v. Fitzharris*, C.D.Cal., 1971, 311 F.Supp. 918, the district court stated that the California Supreme Court had denied a petition for habeas corpus on January 8, 1970, without opinion, but citing *In Re Hillery*. An independent review of the order issued on January 8, 1970 (Crim.—13791—*In Re Erenyi on Habeas Corpus*) reveals that the California Supreme Court did not cite *In Re Hillery* but rather cited *In Re Sterling* (1965) 63 Cal.2d 486. *In Re Sterling* is often cited by the California Supreme Court in denying habeas corpus petitions because it stands for the proposition that habeas corpus relief is not available in California courts for constitutional claims that do not attack the reliability of the fact finding process. See *In Re Sterling*, 1965, 63 C.2d 486; 47 Cal. Rptr. 205, 407 P.2d 5.

[5]A petitioner cannot appeal from the denial of his petition for a writ of habeas corpus by the Superior Court or by the Court of Appeal. *In Re Crow*, 1971, 4 C.3d 613; 94 Cal. Rptr. 254, 483 P.2d 1206, 1212 n.8. His only remedy lies in successive petitions in the higher state courts and the doctrine of res judicata does not operate to bar these actions. *Id.* Hence, the only posture in

exercise its original habeas corpus jurisdiction and it has laid out a procedure whereby the appellate courts can refer a habeas corpus petition to the Superior Court by an order to show cause returnable in the Superior Court. *In Re Hochberg, supra,* 471 P. 2d at 3-4.[6] There is now no reason to suppose that a postcard denial without opinion is indicative of anything but a decision on the merits of the petition, except where a citation in the order tells us so.

For the purposes of the exhaustion doctrine, this practice of the California Court is beneficial. If the denial of the habeas corpus petition includes a citation of an authority which indicates that the petition was procedurally deficient or if the California Supreme Court so states explicitly, then the available state remedies have not been exhausted as the California Supreme Court has not been given the required fair opportunity to correct the constitutional violation. *Daniels v. Nelson,* 9 Cir., 1972, 453 F. 2d 340, 342; *Picard v. Connor,*

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which the California Supreme Court rules upon a petition for a writ of habeas corpus is within its original jurisdiction (unless the writ has been issued below and the State exercises its right of appeal, *Id.*). Therefore as a general rule the California Supreme Court will not even mention whether an application for a writ of habeas corpus was applied for below. *See, e.g., In Re Brown,* 1973, 9 C.3d 612; 108 Cal. Rptr. 465; 510 P.2d 1017; *In Re Underwood,* 1973, 9 C.3d 345; 107 Cal. Rptr. 401, 508 P.2d 721; *In Re Crumpton,* 1973, 9 C.3d 463; 106 Cal. Rptr. 770, 507 P.2d 74.

[6]The preferred forum for the filing of habeas corpus petitions in California is, of course, still the Superior Court as the discussion in *Hochberg* makes clear. *See In Re Elias, supra; In Re Cortez,* 1971, 6 C.3d 78; 98 Cal. Rptr. 307; 490 P.2d 819, 825. As to this procedure, see our decisions in *Palmer v. Comstock,* 9 Cir., 1968, 394 F.2d 395, and *Morehead v. State of California,* 9 Cir., 1964, 339 F.2d 170.

supra. Cf. Humphrey v. Cady, 1972, 405 U.S. 504, 516. However, when the California Supreme Court denies a habeas corpus petition without opinion or citation, or when it otherwise decides on the merits of the petition, the exhaustion requirement is satisfied. *Brown v. Allen,* 1953, 344 U.S. 443, 449 n.3.[7]

Our decisions in *Moreno v. Nelson, supra, Baskerville v. Nelson, supra, Turner v. Lloyd, supra,* and *Conway v. Wilson, supra,* to the extent that they are inconsistent with this opinion, are overruled.

The orders appealed from are reversed, and the cases are remanded to the district court for further proceedings, consistent with this opinion.

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[7]This assumes that there has been no deliberate bypass of state remedies, *Fay v. Noia, supra,* that the claim presented to the state court was the substantial equivalent of the claim presented to the federal court, *Picard v. Connor, supra; Rose v. Dickson,* 9 Cir., 1964, 327 F.2d 27, and that no other bar to the consideration by the federal court remains.

APPENDIX B.

Order.

United States Court of Appeals, for the Ninth Circuit.

Paul Harris, Petitioner-Appellant, vs. Superior Court of the State of California for the County of Los Angeles, Peter Pitchess, Sheriff of Los Angeles County. Co-Respondents, The State of California, Real Party in Interest, Appellees. No. 72-2849.

Fawn Harris, Petitioner-Appellant, vs. Superior Court of the State of California for the County of Los Angeles, Peter Pitchess, Sheriff of Los Angeles County, Co-Respondents, the People of the State of California, Real Party in Interest, Appellees. No. 72-2852.

On Appeal from the United States District Court for the Central District of California.

Before the Court In Banc.

Filed: Aug. 30, 1974.

The petition for a rehearing is denied.

APPENDIX C.

Order Dismissing Petition for Writ of Habeas Corpus.

United States District Court, Central District of California.

Paul Harris, Petitioner, vs. Superior Court of the State of California for the County of Los Angeles, Peter Pitchess, Sheriff of Los Angeles County, Co-Respondents, The People of the State of California, Real Party in Interest. No. 72-2427-DWW.

Filed: Oct. 17, 1972.

Petitioner was convicted in the Superior Court of the County of Los Angeles of one count of a violation of Section 496 of the California Penal Code (Receiving Stolen Property). Petitioner's wife, Fawn Harris, was a co-defendant and was convicted of the same charge. Both were represented by an attorney retained by them. An appeal was taken to the Court of Appeals and the conviction was affirmed. In this petition the petitioner alleges that he did not appeal to the California Supreme Court because he was not notified by his attorney of the Court of Appeals decision until the time for petitioning for a hearing had expired. However, petitioner filed a petition for writ of habeas corpus in the California Supreme Court and it was denied without comment. He now alleges that he has exhausted the remedies available to him in the State Courts and claims that this Court has jurisdiction to hear his petition for writ of habeas corpus which alleges:

a) That he was never advised in the State Court of his right to separate counsel;

b) That a conflict of interest or potential conflict of interest existed in the State Court between petitioner and his co-defendant, Fawn Harris;

c) That his counsel failed to consult with him in preparation of the trial;

d) That his counsel gave him inadequate representation and did not call witnesses who were available to be called to speak for the defense and that his counsel was incompetent.

Without attempting to reach the merits of the allegations set forth by petitioner, this Court dismisses the petition because there has not been an exhaustion of state remedies in that the petitioner has failed to request permission for filing a late appeal pursuant to California Court Rules 31a. *Williams v. Nelson*, 431 F. 2d 932 (9th Circuit, 1970).

The petition is ordered dismissed.

Dated: This 16th day of October, 1972.

/s/ David W. Williams,
DAVID W. WILLIAMS,
United States District Judge

Order Dismissing Petition for Writ of Habeas Corpus.

United States District Court, Central District of California.

Fawn Harris, Petitioner, vs. Superior Court of the State of California for the County of Los Angeles, Peter Pitchess, Sheriff of Los Angeles County, Co-Respondents; The People of the State of California, Real Party in Interest. No. 72-2428-DWW.

Filed: Oct. 17, 1972.

Petitioner was convicted in the Superior Court of the County of Los Angeles of one count of a violation of Section 496 of the California Penal Code (Receiving Stolen Property). Petitioner's husband, Paul Harris, was a co-defendant and was convicted of the same charge. Both were represented by an attorney retained by them. An appeal was taken to the Court of Appeals and the conviction was affirmed. In this petition the petitioner alleges that she did not appeal to the California Supreme Court because she was not notified by her attorney of the Court of Appeals decision until the time for petitioning for a hearing had expired. However, petitioner filed a petition for writ of habeas corpus in the California Supreme Court and it was denied without comment. She now alleges that she has exhausted the remedies available to her in the State Courts and claims that this Court has jurisdiction to hear her petition for writ of habeas corpus which alleges:

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The petition is ordered dismissed.

Dated: This 16th day of October, 1972.

/s/ David W. Williams
DAVID W. WILLIAMS
United States District Judge.